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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

ACCELERATED TRANSPORT—PONY EXPRESS, INC., ET AL.,
Appellants

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Vermont

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JURISDICTIONAL STATEMENT

THE OPINIONS AND ORDERS BELOW

On March 20, 1963 the Interstate Commerce Commission entered its report and order in *General Increase—Middle Atlantic and New England Territories*, reported at 319 I.C.C. 168, in which it found certain rates for the transportation of property by common carriers by motor vehicle in interstate and foreign commerce unlawful and ordered them cancelled. On No-

vember 12, 1963 the Commission denied reconsideration of that report and order. On March 3, 1964 the United States District Court for the District of Vermont entered its opinion, reported at 227 F. Supp. 815, and on March 30, 1964 its judgment affirming the report and order of the Commission. The opinion and the judgment of the District Court are Appendix A hereto. The report and order of the Commission are Appendix B hereto.

JURISDICTION

The jurisdiction of the District Court was invoked under Sections 1336, 2284 and 2321 through 2325 of Title 28 of the United States Code, which Sections give the District Courts of the United States jurisdiction to review and set aside orders of the Interstate Commerce Commission and prescribe the procedure for the exercise of that jurisdiction. The jurisdiction of this Court to review the judgment of the District Court is founded on Section 1253 of Title 28 of the United States Code and was invoked by the filing of a notice of appeal from that judgment on March 30, 1964.

THE RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set forth in Appendix C hereto.

QUESTIONS PRESENTED

1. Did the District Court err in answering in the affirmative the following question presented to it by Plaintiffs in brief and argument: Can the Interstate Commerce Commission, having instituted an investigation of general increases in the rates of a group of motor carriers to and from all points within a particu-

lar territory (intraterritorial rates) and having found on the record that the increased rates are at a just and reasonable level and properly related to one another, nevertheless direct reductions in such of the rates as are higher than other rates to and from points beyond that territory (interterritorial rates), which other rates were established by different groups of carriers, were not under investigation, and upon which no evidence was adduced?

2. Did the District Court err in holding that a finding of undue preference, prejudice or discrimination is not necessary to sustain the validity of an order of the Interstate Commerce Commission directing the cancellation of intraterritorial rates solely because they were higher for shorter distances than interterritorial rates for longer distances?

3. Did the District Court err in holding that if motor carriers choose to participate in lower interterritorial rates they are bound to arrange to maintain no higher intraterritorial rates?

STATEMENT OF THE CASE

All Appellants except Middle Atlantic Conference are common carriers of property by motor operating in interstate and foreign commerce at rates required to be filed with and regulated by the Interstate Commerce Commission. Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b, permits common carriers to collectively establish their rates provided the agreements and procedures for so doing are approved by the Commission. Acting under Section 5a some 1,300 motor carriers have banded together as the Middle Atlantic conference, through which agency they establish, publish and file with the Commission their rates for

the transportation of property within Middle Atlantic Territory, between that Territory and New England Territory, and between those Territories and parts of Canada. Middle Atlantic Territory comprises the States of New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia and West Virginia, the District of Columbia, and some few points in the Eastern parts of the States of Kentucky and Tennessee. New England Territory comprises the States of Maine, Vermont, New Hampshire, Massachusetts, Rhode Island and Connecticut.[1]

Middle Atlantic Conference is only one of many agencies by which motor carriers collectively establish, publish and file rates. For example, the New England Motor Rate Bureau performs the same function for carriers operating within New England. The Southern Motor Carriers Rate Conference performs the same function for carriers operating within the South and between the South on the one hand and Middle Atlantic Territory and New England on the other. The Eastern Central Motors Carriers Association performs the same function for carriers operating between Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, Missouri, Oklahoma and Texas on the one hand and Middle Atlantic Territory and New England on the other. It is the existence of these separate agencies, each making rates for their own members in the light of the circumstances and conditions of transportation within their own territories, that gives rise to the present controversy.

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[1] The precise boundaries of Middle Atlantic and New England Territories are defined in footnotes 4 and 5 in the Commission's report in *Class Rates, Middle Atlantic and New England Territories*, 67 M.C.C. 741, 743 (1956).

Middle Atlantic Conference, acting in accord with its procedures approved by the Commission under Section 5a of the Act, affected on January 16, 1961 on behalf of all of its 1,300 members a general increase in virtually all of their intraterritorial rates, i.e., their rates for the transportation of property within Middle Atlantic Territory and between that Territory and New England. The Commission denied requests by shippers that it suspend the increased rates but did set them for investigation. On March 20, 1963 the Commission, having held a hearing and entertained briefs and exceptions to its hearing examiner's recommendations, issued a report and order, Appendix B hereto, in which it found that the carriers were in need of additional revenues and that the increased rates would not produce revenues in excess of that need (App. B, p. 27a). It further found that the increased rates fairly distributed the burden of meeting that need among the various descriptions of commodities and sizes of shipments, and that the increased rates to and from all points within Middle Atlantic Territory and between all points in that Territory and all points in New England were properly related to one another (App. B, p. 15).

However, the Commission noted that some of the increased intraterritorial rates to points at or near the southern and western borders of Middle Atlantic Territory were higher than the interterritorial rates to more distant points beyond those borders. The latter rates were not established by Middle Atlantic Conference, but rather by the Southern Conference and the Eastern Central Association, respectively. Hence, they were not under investigation. Nevertheless, the Commission held the higher intraterritorial rates un-

lawful to the extent that they exceeded the lower interterritorial rates. Its entire discussion of this matter in its report is as follows:

> "A number of instances are shown where the proposed rates are higher to border points within the affected area which are intermediate over the same routes to points outside the area to which lower rates apply. The respondents claim that they are powerless to correct such situations, and suggest that the rates to and from the border points be required as minimum rates to and from the more distant points. *Interterritorial rates are not here in issue.*" (App. B, p. 24a; Emphasis supplied).
>
> * * * *
>
> "With respect to resulting higher rates to border points than to points beyond over the same routes, *obviously, in accord with prior decisions of the Commission, such higher rates would be unlawful,* and we concur in the conclusion of the examiner in this respect that *if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points.* To the extent that such maladjustments occur, the increased rates are unjust and unreasonable.
>
> "We find that the increased rates and charges are just and reasonable, except that where the resulting rates to intermediate points are higher than the rates to more distant points over the same routes, the former are not shown to be just and reasonable. The schedules will be ordered canceled to the extent found unlawful, without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points in the area here considered." (App. B, p. 28a; Emphasis supplied).

On December 17, 1963 Appellants, pursuant to Rule 23(a)(3) of the Rules of Civil Procedure for the United States District Courts, filed a class suit on behalf of themselves and all others similarly situated to enjoin the Commission's order in the District Court for the District of Vermont. On March 3, 1964 that Court, composed of Circuit Judge Waterman and District Judges Gibson and Blumenfeld, held that:

> "There is ample warrant in the evidence and the statute for the findings in the Commission's report. The report on its face clearly expresses and explains the conclusions reached. And, in our view, the Commission's conclusions were not inadequate, immaterial or arbitrary. See *Gilbertville Trucking Co.* v. *U. S.*, 371 U.S. 115, 83 S. Ct. 217, 9 L. Ed. 2d 177 (1962). Accordingly, we sustain the order of the Interstate Commerce Commission and order that the complaint be dismissed." (App. A, p. 11a).

The District Court's erroneous rationale is deceptively simple. It first held that higher rates for shorter hauls than for longer hauls "is so significant an element affecting reasonableness as to make such rates unreasonable on their face." (App. A, p. 6a). Proceeding on that premise, it held that Appellants had the burden of proving that their "increases in rates which would result in a higher rate for a shorter than a longer haul were just and reasonable", and that they had failed to carry that burden notwithstanding the Commission's finding that "increased rates of all the carriers considered as a group in other respects were reasonable." (App. A, p. 8a).

Rejecting Appellants' contention that a finding that the higher rates were unduly preferential or preju-

dicial or unjustly discriminatory was necessary to support the Commission's order, the Court held:

> "Under sub-section 216(a) of the Act, motor carrier rates are required to meet two separate and distinct criteria: First, they must be 'just and reasonable;' and second, they must not result in 'undue or unreasonable preference or prejudice.' The report of the Commission is unmistakably clear that the basis for condemning the higher rates to border points was that the rates to that extent were not shown to be just and reasonable. The Commission did not purport to find that the rates resulted in undue preference and prejudice. *Such a finding was not necessary for the decision reached or to the validity of the order.*" (App. A, p. 10a; Emphasis supplied).

Finally, the District Court held:

> "We agree with the examiner's reasoning concurred in by the Commission 'that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points.' *To the extent that such maladjustments occur, the increased rates are unjust and unreasonable.*" (App. A, p. 11a; Emphasis supplied).

THE REASONS FOR PLENARY REVIEW

The Contrast Between Appeal and Certiorari

The District Court's judgment is before this Court upon appeal, rather than upon a petition for a writ of certiorari. The difference between an appeal and a petition for a writ of certiorari is not one of procedure only. It is one that has fundamental substantive consequences. The jurisdiction to review cases upon writs of certiorari "was not conferred upon this court merely to give the defeated party . . . another hearing."

Magnum Import Co. v. *Coty,* 262 U.S. 159, 163 (1923). Hence, as this Court has made clear, the denial of a petition for a writ of certiorari means nothing more than that fewer than four members of this Court were of the view that there were, in the words of its Rule 19, "special and important reasons" for considering the merits of the case. *Sunal* v. *Large,* 332 U.S. 174, 181 (1947). A denial does not carry any implication, much less constitute a holding, that the judgment that is the subject of the petition or the statement and application of the law upon which it is grounded is either right or wrong, sound or unsound. See opinions of Mr. Justice Franfurter in *Agoston* v. *Commonwealth of Pennsylvania,* 340 U.S. 844 (1950); *State of Maryland* v. *Baltimore Radio Show, Inc.,* 338 U.S. 912 (1950).

In contrast, the jurisdiction to review cases upon appeal does give the defeated party another hearing. Hence, this Court has no discretion to decline to consider the merits of such cases. It must affirm, reverse, vacate or modify the judgment appealed. Hence, the summary affirmance of a judgment constitutes a holding that it is right. Morevor, the summary affirmance of a judgment that must stand or fall on the particular statement and application of the law on which it is grounded constitutes the approval of that statement and that application of the law. See *National Motor Freight Traffic Association, Inc.* v. *United States,* 372 U.S. 246 (1963), in which this Court supplemented a *per curiam* order of affirmance to make clear that it approved one of two distinct holdings of the District Court but disapproved the other.

We respectfully point to this fundamental difference between an appeal and a petition for a writ of certiorari as having particular significance in this case in view of the broad sweep of the District Court's

opinion and the enlargement of the regulatory authority of the Interstate Commerce Commission it effects. As we will show, it is anything but "manifest that the questions [of statutory construction and of the meaning and application of governing principles established by this Court] on which the decision of the cause depends are so unsubstantial as not to need" plenary consideration (Rule 16, 1(c)).

The Necessity of Findings of Preference, Prejudice or Discrimination

The crux of this case is the District Court's holding that:

> "Under sub-section 216(d) of the Act, motor carrier rates are required to meet two separate and distinct criteria: First, they must be 'just and reasonable;' and second, they must not result in 'undue or unreasonable prejudice or disadvantage.' The report of the Commission is unmistakably clear that the basis for condemning the higher rates to border points was that the rates to that extent were not shown to be just and reasonable. The Commission did not purport to find that the rates resulted in undue preference and prejudice. Such a finding was not necessary for the decision reached or to the validity of the order." (App. A, p. 10a)

The question here is whether the "basis for condemning the higher rates [as] not shown to be just and reasonable" is adequate to sustain the Commission's order. That basis was purely and simply a presumption that rates higher for shorter hauls than for longer hauls are unreasonable. This presumption was invoked by both the Commission and the District Court in reliance on the statement in *Patterson* v. *Louisville & Nashville R.*, 269 U.S. 1, 11 (1926), that: "Apart from statutory enactment, it is prima facie unreasonable to charge more for a shorter haul than for a longer haul."

The *Patterson* Case sheds no light on the question whether evidence that the higher rates are themselves reasonable will rebut the presumption. However, the decision of the Court of Appeals for the Fifth Circuit that it affirmed does. That case arose on a complaint to the Commission for reparations grounded on the maintenance by a railroad of through rates higher than the aggregate of intermediate rates in violation of Section 4 of the Act, 49 U.S.C. § 4. The Commission awarded reparations. It said: "Upon the record now before us, we find that, while the rates assailed appear not unduly high, they were unreasonable in and to the extent that they respectively exceeded the aggregates of the intermediate rates subject to the act." The Court of Appeals, affirming a judgment of the District Court reversing the Commission, held that "the presumption [of unreasonableness] arising in ordinary cases, is rebutted, as it is found by the unanimous report of the commissioners that the charge is not unreasonably high." *Patterson* v. *Louisville & Nashville R.*, 2 F. 2d 592, 593 (5th Cir. 1924). The Supreme Court affirmed the judgment of the Court of Appeals on the ground that the only cause of action alleged in the complaint to the Commission was a violation of Section 4. It therefore held that there was "no occasion to pass upon the effect of the finding that the through rates were 'not unduly high'" 269 U.S. at 8.

However, the Commission itself abides the holding of the Court of Appeals in the *Patterson* Case. It holds that the presumption that higher rates for shorter hauls than for longer hauls are unreasonably high is rebutted by a showing that the higher rates are themselves within the zone of reasonableness. See *F. P. Maggioni & Co.* v. *Atlantic Coast Line R.*, 272 I.C.C.

127 (1948). That case, like the *Patterson* Case, was a complaint for reparations based on the maintenance by a railroad of rates to intermediate points higher than its rates to more distant points in violation of Section 4. Although the Commission found that the higher rates to intermediate points were unauthorized departures from Section 4 and therefore unlawful, it denied reparations on the ground that any presumption of unreasonableness arising therefrom "is here rebutted by the fact that the rate to the intermediate point is below a basis recognized as a reasonable maximum by this Commission." 272 I.C.C. at 131. So too, the presumption may be rebutted by a showing that the rate to the more distant point is lower than a maximum reasonable rate. *Oklahoma Portland Cement Co.* v. *M. K. T. R.*, 139 I.C.C. 685 (1928).

We submit that Appellants rebutted any presumption of unreasonableness here. As the Commission said at the outset of its report (App. B, p. 15a, this case was "an investigation . . . into the lawfulness of general increases in motor carrier class and commodity rates, and in rates and charges for accessorial services . . . between points in Middle Atlantic Territory . . . and between Middle Atlantic and New England Territories." As though to emphasize the foregoing, it further said: "Interterritorial rates are not here in issue." (App. B, p. 24a). As the District Court said: "This case originated and was conducted as a general revenue proceeding in which the carriers' needs, as a group, for a general increase in rates were considered by the Commission . . ." (App. A, p. 2a).

The issue in general revenue cases, i.e., the "carriers' needs as a group," is to be resolved under the criteria of the rule of rate making prescribed in Sec-

tion 216(i) of the Act, 49 U.S.C. § 316(i). *Increased Common Carrier Truck Rates In The East,* 42 M.C.C. 633 (1943). This being a general increase case, the controlling criteria in Section 216(i) are "the need, in the public interest, of adequate and efficient transportation service by [the carriers whose rates are at issue] at the lowest cost consistent with the furnishing of such service; and . . . the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management to provide such service." *Increased Common Carrier Truck Rates In The East,* supra, 42 M.C.C. at 650. Under Section 216(g) of the Act, 49 U.S.C. § 316(g), Appellants had the burden of proof on this issue. They therefore went forward with evidence to show that their increased rates met the criteria of Section 216(i). The Commission found that they had carried their burden on this issue when it found that their rates were just and reasonable. Nevertheless, it further found and the District Court agreed, that Appellants had not carried their burden "to show that the proposed increases in rates which would result in a higher rate for a shorter than a longer haul were just and reasonable." (App. A, p. 8a).

The District Court held that there was no "inconsistency between the Commission's finding that higher rates to border points were not shown to be reasonable and its finding that increased rates of all the carriers considered as a group in other respects were reasonable." (App. A, p. 8a). We submit that this holding is plainly erroneous. Its effect is to hold that Appellants could not establish the reasonableness of the intraterritorial rates in issue by showing that they were in fact within the zone of reasonableness, but only by justifying the relationship between the intraterri-

torial rates in issue and the interterritorial rates not in issue. In so holding the District Court failed to differentiate between what it itself recognized as the "two separate and distinct criteria" that rates must meet, namely the criteria for justness and reasonableness and the criteria for absence of preference, prejudice or discrimination. It thereby obliterated what this Court emphasized in *State of New York* v. *United States*, 331 U.S. 284, 350 (1947), namely "the distinction between revenue and rate relationship cases."

The problem in revenue cases is to determine whether the rates under investigation are "below the lowest or above the highest reaches of reasonableness." The problem in rate relationship cases is to determine whether the relationships under investigation result in discrimination or preference or prejudice. *State of New York, supra*, 331 U.S. at 344. Since both the Commission and the District Court held here, in the latter's words, that the question of preference or prejudice "is irrelevant to the issue or proof in this case", it follows that the relationship of the intraterritorial rates under investigation to the interterritorial rates not under investigation was irrelevant. Yet, both the Commission and the District Court held that the intraterritorial rates, although within the zone of reasonableness, were unreasonable solely because of their relationship to the interterritorial rates.

The holding of the District Court squarely conflicts with *State of New York*. In that case the Commission entered into a general investigation of the lawfulness of rail classifications and class rates throughout the United States. It concluded *inter alia*, after exhaustive hearings spanning several years, that the relation be-

tween interterritorial rates to and from points beyond Official Territory and intraterritorial rates within Official Territory resulted in an unlawful preference to Official Territory in violation of Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1).[2] To cure this unlawfulness it prescribed a reduction of 10 per cent in the interterritorial rates and an increase of 10 per cent in the intraterritorial rates. This Court sustained the Commission's order against the contention that increases in intraterritorial rates could be required only upon findings supported by substantial evidence that those rates were below the zone of reasonableness. It held, 331 U.S. at 344-345:

> "*If this were a case of determining whether existing rates passed below the lowest or above the highest reaches of reasonableness, the point might be well taken.* See United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499, 506, 55 S. Ct. 462, 465, 79 L.Ed. 1023. But we do not have here such a revenue problem. *This case presents problems in rate relationships, that is to say, problems of a discriminatory rate structure condemned by § 3(1).* The Commission may remove a discrimination effected by rates even when they are within the zone of reasonableness, if the discrimination is forbidden by § 3(1). As Mr. Justice Brandeis stated in United States v. Illinois Central R. Co., supra, 263 U.S. at page 524, 44 S. Ct. at page 193, 68 L.Ed. 417, the mere fact that one rate is 'inherently reasonable and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice.' The Commission has the power to adjust the rates,

[2] Official Territory is the rail-rate making territory embracing generally that part of the United States east of the Mississippi River and north of the Ohio River.

upwards and downwards, within that zone, in order to eradicate the discrimination. That power is not unlimited; there are standards which control its exercise." (Emphasis supplied).

We submit that the point that was not well taken in *State of New York* is well taken here. In contrast to the case there the case here *is one* of determining whether rates are "below the lowest or above the highst reache of reasonableness." In contrast to the case there in the case here we *do have* a "revenue problem." In contrast to the case there the case here *does not* present "problems in rate relationships, that is to say problems of a discriminatory rate structure." In contrast to the case there in the case here the Commission *did not* purport to exercise its power to "remove a discrimination effected by rates even when they are within the zone of reasonableness." In contrast to the case there in the case here the Commission *did not* exercise its "power to adjust the rates, upwards and downwards, within that zone, in order to eradicate the discrimination."

In *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499 (1935), cited by this Court in the above quoted passage from *State of New York*, the Commission investigated reduced rail rates on coal from certain mines in Indiana to Rockford and Freeport, Illinois. There, as here, it found the rates unreasonable because of their relationship to other rates not under investigation. Specifically, it found them unreasonable because they would "lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act; that they would cause a disruption of the in-

dividual groups from which the rates are proposed; and that they would cause a disruption of the long standing rate relation existing for competitive purposes, between the several Indiana groups." As quoted by the Court, 294 U.S. at 505-506. On these findings the Commission held the rates unreasonable and ordered them cancelled. Mr. Justice Cardozo, speaking for a unanimous Court, held the order invalid for lack of adequate findings supported by sustantial evidence. He said:

> "The statement . . . that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated. There is no suggestion in the report that the rates have been so reduced as to be less than compensatory. True they do not reach the maxima beyond which charges are excessive. On the other hand, they do not pass the minima beyond which charges are too low. A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself. We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute. Interstate Commerce Act, § 15a (49 USCA § 15a). Those tendencies excluded, 'a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise.'" 294 U.S. at 506 (Citations omitted).

Subjecting the Commission's findings to what he called "these tests", Mr. Justice Cardozo pointed out that the disruption of a rate structure "without more is no sufficient reason for prohibiting a change." 294 U.S. at 507. Mr. Justice Cardozo further pointed out

that the Commission had not found "that the existing relation is intrinsically sound and fair. On the contrary, it expressly concedes that the rate situation . . . may be in need of correction." 294 U.S. at 509. He then held that the appropriate action for the Commission was not to set aside the railroad's adjustment in rates but to institute "a comprehensive inquiry into the rates of all the lines within the area of controversy, . . . fix the fair relation between one line and another, and . . . build the rate structure accordingly." 294 U.S. at 509.

The principles applied in the *Chicago* Case are obviously just as apposite in cases of rate increases as they are in cases of rate reductions. Except that this case is one of rate increases, it is on all fours with that case. Here as there the Commission found rates under investigation unreasonable solely because of their relation to other rates not under investigation. Here no more than there did the Commission find that the rate relation its order compels the carriers to establish "is intrinsically sound and fair." Here as there, if the Commission is of the view that the "rate situation as [between points within Middle Atlantic Territory and points beyond] be in need of correction", the appropriate action is "a comprehensive inquiry into [all of] the rates of all the lines within the area of controversy," in which it can "fix the fair relation . . . and build the structure of the rates accordingly."[8] Here no more than there can the Commission order the cancellation of rates that are just and reasonable under the criteria of the rule of rate making.

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[8] This is precisely what Appellants asked the Commission to do in their Petition for Reconsideration of its order in this case.

The foregoing makes plain that the Commission has no power to compel either an increase or a decrease in rates that are within the zone of reasonableness except to remove discrimination, preference or prejudice, and then only under the "standards which control [the] exercise" of the power. The basic standard is of course a finding supported by substantial evidence that discrimination, preference or prejudice exist. No such finding was made in this case.

The Long and Short Haul Clause is Inapplicable

The District Court sought to bolster its holding with the following statement:

> "We agree with the examiner's reasoning concurred in by the Commission 'that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points.' Id. [319 I.C.C.] at 177. To the extent that such maladjustments occur, the increased rates are unjust and unreasonable." (App. A, p. 11a).

This statement amounts to a holding that rates of common carriers by motor higher for shorter distances than for longer distances are unlawful *per se*. This holding is plainly wrong. Section 4 of the Act, 49 U.S.C. § 4, makes it unlawful for rail or water carriers to charge more for a shorter than for a longer haul over the same route of movement unless they first obtain specific permission from the Commission to do so. Section 4 has nothing to do with the reasonableness of such higher rates. Hence a violation of it will not ground a suit for reparations. *Patterson v. Louisville & N. R., supra.* The purpose of Section 4 was to single out and prohibit one particular form of discrimination because of its prevalence among railroads at the time they were brought under federal

regulation. *McClelan* v. *Southern Ry.*, 6 I.C.C. 588 (1896). The effect of Section 4 is to transfer, in this limited respect, the initial rate making authority from the carriers to the Commission. *Intermountain Rate Cases*, 234 U.S. 476 (1914).

Section 4 was not embraced in the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, either directly or by reference to Part I. Hence, it is not applicable to motor carriers.[4] They, not the Commission, have initial rate making authority in all respects other than in fixing rates conditioned on limitations of their liability for loss and damage. The Commission's function is limited to reviewing the rates they make. In other words, motor carriers are free to discharge as they see fit their duty under Section 216(b) of the Act to establish rates, subject only to the authority of the Commission under Sections 216(e) and 216(g) to review those they have established and determine their lawfulness *vel non* under the criteria in Sections 216(d) and 216(i). Under those criteria rates, if just and reasonable in themselves, can be found unlawful only if they are found to result in unjust discrimination or undue preference or prejudice. As we have seen, the Commission and the District Court found Appellants' rates just and reasonable in themselves and held that there was no question of discrimination, preference or prejudice in this case. It follows that the fact that the rate relationships to which

[4] Since joint rail-motor rates are established pursuant to the authority of and governed by the criteria in Section 216(c) of Part II, 49 U.S.C. § 316(c), there is serious question whether Section 4 applies to such rates. See the Examiner's Report of April 1, 1964 in *Application of Section 4 Requirements To Joint Motor-Rail Rates Established Under Section 216(c)*, Docket No. 34234, holding that Section 4 does not apply. That case is now pending before the Commission on exceptions to that Report.

the Commission's order was addressed were relationships between rates for shorter hauls and rates for longer hauls over the same routes of movement does not make the principles of the *State of New York* and *Chicago* Cases any less controlling here.

In sum, Appellants are free, indeed duty bound as common carriers, to perform such transportation as their certificates of public convenience and necessity authorize at whatever lawful rates they choose. Neither the Commission nor the District Court can condition their exercise of this right and their performance of this duty on their reducing lawful rates in observance of Section 4, the provisions of which the Congress did not see fit to make applicable to them.

CONCLUSION

We have shown that the opinion of the District Court mis-apprehended and mis-applied the principles of law and the statutory criteria that govern the exercise by the Interstate Commerce Commission of its authority to determine whether Appellants' rates in issue are just and reasonable, and that its judgment affirming the Commission's order requiring Appellants to cancel those rates is necessarily based on that erroneous opinion. We submit that it follows that this Court's duty on this appeal is to reverse that judgment.

Respectfully,

BRYCE REA, JR.
1329 E Street, N. W.
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LOUIS LISMAN
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Counsel for Appellants

May 29, 1964

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil No. 3883

ACCELERATED TRANSPORT-PONY EXPRESS, INC., ET AL.

-VS-

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; LYNCHBURG TRAFFIC BUREAU, *Intervenor*

Before Waterman, Circuit Judge, and Gibson and Blumenfeld, District Judges.

Louis Lisman, Esq., Lisman & Lisman,
131 College Street, Burlington,
Vermont, for the Plaintiffs

Bryce Rea, Jr., Esq. Rea, Cross & Knebel,
917 Munsey Building,
Washington 4, D.C., for the Plaintiffs

Joseph F. Radigan, United States Attorney,
Federal Building,
Rutland Vermont, for the Defendant
United States

Robert W. Ginnane, Esq.,
Interstate Commerce Commission,
Washington 25, D.C., for the Defendant ICC

Clayton H. Kinney, Esq.,
Rutland, Vermont, for the Intervenor

Wilbert G. Burnett, Esq.,
1017 Church Street,
Lynchburg, Virginia, for the Intervenor

BLUMENFELD, *District Judge.*

The Middle Atlantic Conference[1] filed a schedule of

[1] The Middle Atlantic Conference is an organization of motor carriers, established pursuant to § 5a of the Interstate Commerce Act, 62 Stat. 472 (1948), 49 U.S.C. § 5b (1958), which establishes and publishes rates for the account of its members.

proposed rates with the Commission which would establish a general increase in motor carrier class and commodity rates between points in Middle Atlantic Territory[2] and between Middle Atlantic and New Engiand Territories.[3] On January 13, 1961, the Commission instituted an investigation into the lawfulness of the proposed increases. Pending a final decision by the Commission, the increases became effective on January 16, 1961. Protests to the increased rates were filed by numerous parties, including those who have intervened as defendants in this court proceeding.

This case orginated and was conducted as a general revenue proceeding in which the carriers' needs, as a group,[4] for a general increase in rates[5] were considered by the Commission, as distinguished from a need of individual carriers for increased rates for specific traffic or different commodities. To effect the increase in revenue, the plaintiffs proposed generally to superimpose flat arbitrary amounts on already existent rates, regardless of classification ratings. It is plain that flat arbitraries would distort traditional percentage relationships between classifications and would result in greater increases percentage-wise and per mile on the shorter hauls and on the lower-rated traffic. The effect of this would be to increase the likelihood of higher rates for short than for long hauls through

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[2] Middle Atlantic Territory includes the states of New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and the District of Columbia, and parts of Kentucky and Tennessee.

[3] New England Territory includes the states of Maine, Vermont, New Hampshire, Massachusetts, Rhode Island and Connecticut.

[4] The group was comprised of approximately 3000 motor carriers of whom some 1300 were members of the Conference.

[5] Except in certain short hauls in the New York Metropolitan area, and some class and commodity rates on interstate routes, all specifically excluded from the proposal submitted by the plaintiffs.

border points and beyond to territories where the rates are lower.

After an exhaustive hearing before one of the Commission's examiners, and following the submission of briefs by the parties, the examiner issued his recommended report and order. The examiner concluded that the proposed increases generally were just and reasonable.* But he also concluded that, where the effect of the proposed increases resulted in rates which were higher to intermediate border points than to points beyond over the same routes, they were not shown to be just and reasonable. Exceptions to the examiner's report were filed by both the respondents (plaintiffs) and the protestants, and on March 20, 1963 the report of Division 2 of the Commission was issued. This stated:

> "With respect to resulting higher rates to border points than to points beyond over the same routes, obviously, in accord with prior decisions of the Commission, such higher rates would be unlawful, and we concur in the conclusion of the examiner in this respect that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points. To the extent that such maladjustments occur, the increased rates are unjust and unreasonable.
>
> "We find that the increased rates and charges are just and reasonable, except that where the resulting rates to intermediate points are higher than the rates to more distant points over the same routes, the former are not shown to be just and reasonable. The schedules will be ordered canceled to the extent found

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*The Commission enlarged the weight categories to which the addition of arbitraries might be found just and reasonable to include shipments of less than 6000 lbs., a finding the examiner was unwilling to make.

[not shown]* unlawful, without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points in the area here considered. The proceeding will be discontinued." (319 I.C.C. at 177)

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* Bracketed portion deleted by Report and Order February 4, 1964.

The petition of the respondents for reconsideration of the report and order of the Commission insofar as it directed them to reduce their rates to border points, filed on May 15, 1963, was denied by Division 2, Acting as an Appellate Division, "for the reason that sufficient grounds have not been presented to warrant granting the action sought."

The respondents thereafter filed this complaint against the United States and Interstate Commerce Commission to set aside and annul the Commission's order, 28 U.S.C. §§ 1336, 1398 (1958), and obtained a temporary restraining order. 28 U.S.C. § 2284(3) (Supp. III, 1959-61). Subsequently, this court of three-judges was convoked as required by 28 U.S.C. § 2325 (1958). The protestants before the Commission were granted leave to intervene in behalf of the defendants. The restraining order was continued in effect only until a hearing was held on plaintiffs' action for final relief. We have concluded that the complaint should be dismissed.

The target of the plaintiffs' argument is that portion of the Commission's decision which holds that such higher rates to intermediate border points are not shown to be just and reasonable. The plaintiffs do not challenge the finding that blanket application of the arbitraries to increase all of the rates would in some cases result in a higher charge for hauling goods to a "border point"

located within the Middle Atlantic Territory than for hauling the same goods, over the same route, through the border point, to a point located in a different territory.

The attack proceeds on two grounds: First, that the Commission's reliance upon a presumption that higher rates for shorter distances than for longer distances are unreasonable was unjustified because the "presumption" merely shifted the burden of going forward to the plaintiffs. On that basis they argue that, since they did come forward with evidence, the effect of the presumption was dissipated. Secondly, they contend that "assuming . . . that the fact that some of the plaintiffs' rates for shorter distances are higher than other rates for longer distances has probative value as evidence that they are unreasonable, the evidence as a whole does not support the Commission's finding that they are unreasonable." (Reply Brief for Plaintiffs, p. 9)

These contentions must be considered in light of statutory provisions which govern the rate-making functions of the Commission. Whenever a motor carrier files a tariff containing a new rate, sub-section 216(d) of the Motor Carrier Act,[7] as amended, 49 U.S.C. § 316(d)(1958), requires that it shall be "just and reasonable," and declares that every "unjust and unreasonable charge" is unlawful:

> "(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause

[7] 49 Stat. 543 (1935).

> any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this sub-section shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

And whenever, as in this case, a carrier seeks a change in rates, sub-section 216(g) of the Act, as amended, 49 U.S.C. § 316(g)(1958), places the burden of proof on the carrier:

> "At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable."

These laws are very plain and their application to this case is not difficult. They obviate the need for a critical analysis of the technical refinement of the vocabularly of presumptions urged upon us by the plaintiffs. It has long been established that rates higher for short hauls than for longer hauls, via the same carrier, over the same route, is so significant an element affecting reasonableness as to make such rates unreasonable on their face. In the leading case of *Patterson* v. *Louisville & N. R.R.*, 269 U.S. 1, 46 S. Ct. 8, 70 L. Ed. 131 (1926), Mr. Justice Bradeis stated: "Apart from statutory enactment it is prima facie unreasonable to charge more for a shorter than for a longer

haul." 269 U.S. at 11.[8] Followed in *Atlas Portland Cement Co.* v. *Northampton & B. R.R.*, 120 I.C.C. 583, 585 (1927); *Sun Oil Co.* v. *Central R.R. Co.*, 301 I.C.C. 558, 560 (1957). The same principle has been applied by the Commission since the earliest days of its administration of the Motor Carrier Act. In *Fifth Class Rates Between Boston and Providence*, 2 M.C.C. 530 (1937), it stated:

> "In the absence of a sound reason therefor, the maintenance of class rates to intermediate points higher than to more distant points on the same route by a motor carrier is prima facie unreasonable." (2 M.C.C. at 546)

There is no need to call the entire roll of the many subsequent decisions which have adhered to the principle. A few examples are *New England Motor Carrier Rates*, 8 M.C.C. 287, 322-23 (1938); *Electric Storage Batteries from Kansas to Missouri*, 46 M.C.C. 729, 732 (1947); *Ford Motor Co.* v. *Standard Transp. Co.*, 62 M.C.C. 311, 315 (1953).

The plaintiffs did not urge before us, nor does the extensive record before the Commission disclose, that uncontroverted evidence of segregated costs for the particular traffic subjected to the rates which the Commission has found were not shown to be reasonable was presented to the Commission. Cf. *Middle West Exceptions Ratings, Cancellation*, 48 M.C.C. 53, 58 (1948). That the plaintiffs were fully aware of the presence of this issue is clear. By motion filed March 5, 1962, the carriers sought to sever the issue of border point rate disparities and to postpone further proceedings on that issue. The Commission, by order of June 7, 1962, denied the motion stating that

[8] In the case of rail carriers, Section 4 of the Interstate Commerce Act, 24 Stat. 380 (1887), as amended, 49 U.S.C. § 4 (Supp. IV, 1959-62), specifically prohibits a greater charge for a shorter haul without the Commission's prior approval.

sufficient grounds therefor had not been presented. Denial of that motion is not made a ground of the complaint before us. The plaintiffs had first-hand knowledge that what happened here has often happened before in general revenue proceedings of this nature. In 1949 these plaintiffs were admonished to remove border maladjustments at Lynchburg and other border points. *Increases, Middle Atlantic and New England*, 49 M.C.C. 357, 366. Again in 1956, in *Class Rates Between Middle Atlantic and New England Territories*, 67 M.C.C. 741, the Commission said:

> "Higher class rates for lesser distances over the same routes as revealed on this record are clearly unjust and unreasonable. In publishing rates in conformity with our findings in these proceedings, we shall expect the respondents to eliminate all rate discriminations similar to that above described." (67 M.C.C. at 761)

Nor do the plaintiffs, who are willing enough to accept the approval of the increased rates generally, claim that without the approval of these proposed increases to the rates to border points that those rates are unremunerative. There is no inherent inconsistency between the Commission's finding that higher rates to border points were not shown to be reasonable and its finding that increased rates of all the carriers considered as a group in other respects were reasonable. The burden of proof was on the plaintiffs to show that the proposed increases in rates which would result in a higher rate for a shorter than a longer haul were just and reasonable. They did not satisfy that burden.

The determination of the justness and reasonableness of rates is peculiarly a matter for the judgment and discretion of the Commission. *Board of Trade* v. *United States*, 314 U.S. 534, 545-46, 62 S. Ct. 366, 86 L. Ed. 432 (1942); *Mississippi Valley Barge Line Co.* v. *United States*, 292

U.S. 282, 286-87, 54 S. Ct. 692, 78 L. Ed. 1260 (1934); *Western Paper Makers Chem. Co.* v. *United States*, 271 U.S. 268, 271, 46 S. Ct. 500, 70 L. Ed. 941 (1926).

The Supreme Court pointed out in the *Mississippi Valley Barge Line* case:

> "The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. *Florida* v. *United States, ante*, p. 1. It is not the province of a court to absorb this function to itself. *I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 100; *Western Paper Makers Chemical Co.* v. *United States*, 271 U.S. 268, 271; *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 663. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." (292 U.S. at 286-87)

In *Western Paper Makers Chem. Co.*, the Supreme Court said:

> "The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. *Skinner & Eddy Corporation* v. *United States*, 249 U.S. 557, 562; *New England Divisions Case*, 261 U.S. 184, 204." (271 U.S. at 271)

These decisions in rate cases comport with the general principle that orders of the Commission should not be set aside, modified, or disturbed by a court on review if they lie within the scope of the Commission's statutory authority and are based upon adequate findings, which are in turn supported by substantial evidence, even though the court might reach a different conclusion on the facts

presented. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535-36, 66 S. Ct. 687, 90 L. Ed. 821 (1946); *Rochester Tel. Co.* v. *United States*, 307 U.S. 125, 138-40, 59 S. Ct. 754, 83 L. Ed. 1147 (1939). The Commission's judgment is to be exercised in the light of the facts of each individual case, and the courts have no concern with the consistency or inconsistency of decisions it has rendered. *Virginian Ry.* v. *United States*, 272 U.S. 658, 663, 47 S. Ct. 222, 71 L. Ed. 463 (1926); *Western Paper Makers Chem. Co.* v. *United States, supra.* Furthermore, there is a presumption that the Commission has properly performed its official duties, and this presumption supports its acts in the absence of clear evidence to the contrary. *I.C.C.* v. *City of Jersey*, 322 U.S. 503, 512, 64 S. Ct. 1129, 88 L. Ed. 1420 (1944); *Baltimore & O. R.R.* v. *United States*, 298 U.S. 349, 358-59, 56 S. Ct. 797, 80 L. Ed. 1209 (1936).

The plaintiffs' attempt to inject a question of undue preference and prejudice is rejected as irrelevant to the issue or proof in this case. That question is not in this case. Under sub-section 216(d) of the Act, motor carrier rates are required to meet two separate and distinct criteria; First, they must be "just and reasonable;" and second, they must not result in "undue or unreasonable preference or prejudice." The report of the Commission is unmistakably clear that the basis for condemning the higher rates to border points was that the rates to that extent were not shown to be just and reasonable. The Commission did not purport to find that the rates resulted in undue preference and prejudice. Such a finding was not necessary for the decision reached or to the validity of the order.

The plaintiffs do not contend that the principle that a higher charge for a shorter haul than a longer haul is prima facie unreasonable was inapplicable on the ground that the longer haul terminated outside the territory. But

in an attack upon the order that the scheduled increases which create rate disparities at border points be canceled to the extent that the resultant rates are higher at intermediate than at more distant points, they do contend that since the disparities at the border points are the result of lower rates beyond the border the order is invalid because the plaintiffs have no control over rates beyond the border. This asserted defense was specifically rejected by the Commission:

> "The respondents claim that they are powerless to correct such situations, and suggest that the rates to and from the border points be required as minimum rates to and from the more distant points. Interterritorial rates are not here in issue." (319 I.C.C. at 175)

We agree with the examiner's reasoning concurred in by the Commission "that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points." *Id.* at 177. To the extent that such maladjustments occur, the increased rates are unjust and unreasonable. We perceive no meritorious legal basis for an attack upon the Commission's order that the schedules be "canceled to the extent found unlawful without prejudice to their amendment as to provide for the application of lower rates to more distant points as maxima at intermediate border points in the area here considered." 319 I.C.C. at 177 (as corrected by Report and Order, February 4, 1964). See *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, 310 I.C.C. 503, 505-06 (1960).

There is ample warrant in the evidence and the statute for the findings in the Commission's report. The report on its face clearly expresses and explains the conclusions reached. And, in our view, the Commission's conclusions were not inadequate, immaterial or arbitrary. See *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 83 S. Ct.

217, 9 L. Ed. 2d 177 (1962). Accordingly, we sustain the order of the Interstate Commerce Commission and order that the complaint be dismissed.

Dated March 2, 1964.

M. JOSEPH BLUMENFELD
United States District Judge

Accelerated Transport-Pony Express, Inc. v. United States and ICC

Endorsed: Feb. 27, 1964
I concur
SRW

Further endorsed: Feb. 29 '64
Brattleboro Vt.
I concur—
EWG.

Further endorsed: Filed March 3, 1964
ARNOLD A. MURRAY, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 3883

ACCELERATED TRANSPORT—PONY EXPRESS, INC., ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

Final Judgment

This cause having been submitted upon the record made before this Court, including the record of proceedings before the Interstate Commerce Commission in its Docket No. 33652, and the briefs and arguments of counsel; and the Court having entered its opinion on March 3, 1964, to the effect that the order of the Commission is valid and lawful in all respects, and should be affirmed, it is hereby

ORDERED, ADJUDGED AND DECREED that the order of the Commission be and it is hereby affirmed, and that the plaintiffs' application for permanent injunction be and it is hereby denied.

STERRY R. WATERMAN
Sterry R. Waterman
United States Circuit Judge

ERNEST W. GIBSON
Ernest W. Gibson
United States District Judge

M. JOSEPH BLUMENFELD
M. Joseph Blumenfeld
United States District Judge

Dated at Burlington, Vermont
this 3rd day of March, 1964.

Endorsed: Filed March 30, 1964

ARNOLD A. MURRAY, *Clerk.*

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Service Date April 3, 1963

No. 33652

GENERAL INCREASE—MIDDLE ATLANTIC AND NEW ENGLAND TERRITORIES

Decided March 20, 1963

Increased class and commodity rates of motor common carriers within middle Atlantic territory, and between that territory and New England territory, found just and reasonable, except that where such rates are higher to intermediate border points than the rates to more distant points over the same routes, the former found to be unlawful. Schedules ordered canceled to the extent found unlawful, and proceeding discontinued.

Bryce Rea, Jr., for certain respondents and intervener.

Arthur A. Arsham, John S. Burchmore, Robert N. Burchmore, W. G. Burnette, Edgar W. Caterson, Charles M. Donley, John B. Hedges, George H. Kinney, Morris Levinson, Dickson R. Loos, J. H. Macomber, Jr., John F. C. Martin, Charles B. Myers, William R. Pierce, Warren A. Rawson, and *Stanley H. Tippett* for protestants.

Report of the Commission
Division 2, Commissioners Freas, Webb, and Herring

WEBB, *Commissioner:*

Late exceptions to the examiner's recommendations, received as a brief of exceptions, were filed by certain respondents and the intervener supporting the respondents, and the protestants replied. Also, exceptions were filed by certain protestants. Our conclusions differ in part from those of the examiner. Exceptions and requested findings

not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

This is an investigation, instituted by order dated January 13, 1961, into the lawfulness of general increases in motor common-carrier class and commodity rates,[1] and in rates and charges for accessorial services, published to became effective on January 16, 1961, and later, between points in middle Atlantic territory, with certain exceptions hereinafter noted, and between middle Atlantic and New England territories.[2] With minor exceptions,[3] the increased rates and charges are contained in agency tariffs published by the Middle Atlantic Conference, hereinafter called the Conference, for the numerous motor common-carrier respondents. The rates were protested by several parties,[4] but they were permitted to become effective as published, subject to this investigation. Concurrently with the establishment of the increases, the respondents canceled a

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[1] Rates, charges, increases, costs, and differences therein are stated per 100 pounds, unless otherwise indicated.

[2] The boundaries of the two territories are described in footnotes 4 and 5, *Class Rates, Middle Atlantic & New England Territories*, 67 M.C.C. 741, 743.

[3] Certain tariffs of Continental Transportation Lines, Inc., and of Reading Transportation Company are included also in the investigation; they both agree to be bound by the decision respecting the agency tariffs.

[4] The General Services Administration, representing all executive agencies of the Federal Government except the Department of Defense; the National Industrial Traffic League; Eastern Industrial Traffic League, Inc.; New England Industrial Traffic League; Lynchburg, Va., Traffic Bureau; Official Territory Paper Traffic Conference; Associated Industries of New York State, Inc.; National Paint, Varnish and Lacquer Association, Inc.; Greater Philadelphia Shipper-Receiver Interests; Manufacturers Association of Connecticut, Inc.; Industrial Fasteners Institute; United States Screw Service Bureaus; and National Association of Chain Manufacturers.

temporary surcharge of $1 per shipment, subject to a maximum of 10 percent, which had been in effect since June 27, 1960. For convenience, the increases which became effective on January 13, 1961 will be referred to as the proposed increases, and rates including those increases as the proposed rates.

The proposed increases generally are flat amounts. To the rates on less-than-truckload quantities of under 2,000 pounds, 2,000 to 5,999 pounds, and 6,000 pounds and over, the respective proposed increases for 100 miles and over are 30 cents, 10 cents, and 3 cents. The flat increases on truckload shipments range from 1 to 3 cents. Rates and other charges stated in units other than per 100 pounds are increased 10 percent, except that no increase is proposed in minimum charges per shipment, the latter charges having been separately increased effective December 10, 1960. The proposed increases are detailed in appendix A to this report, and present and proposed class rates for representative distances are shown, along with other data, in appendix B. The increases do not apply within certain portions[5] of middle Atlantic territory, and it appears also that they are not applicable, or are applicable only in part, to the rates on some commodities, of which candy and iron and steel articles in truckloads, and brass and copper articles are mentioned of record.

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[5] Increases are not proposed within the so-called New York short-haul area (New York, N. Y., Nassau, Rockland, Suffolk, and West Chester Counties, N. Y., and a portion of New Jersey), nor between the New York City metropolitan area, including northern New Jersey points, on the one hand, and, on the other, points in a large portion of New York (Herkimer and west). Also, the increases do not apply on class rates over interstate routes between points in New York; on class rates between the Baltimore, Md., and Washington, D. C., areas; on class rates between Cumberland, Md., and some 25 rate groups in western Maryland, southwestern Pennsylvania, northwestern Virginia, and northern West Virginia; nor on commodity rates between the Norfolk, Va., area, on the one hand, and, on the other, Washington, Baltimore, Wilmington, Del., Philadelphia, Pa., and New York, and points in the vicinity of those cities.

A history of the respondents' rates is set forth in *Class Rates, Middle Atlantic & New England Territories*, 67 M.C.C. 741, decided August 2, 1956, hereinafter referred to as No. MC-C-1600, and except for the maintenance from June 27, 1960 to January 16, 1961, of the temporary surcharge and the increase in minimum charges per shipment effective December 10, 1960, stated above, their rates and charges have not been subjected to a general increase since December 1958. In No. MC-C-1600, the respondents' proposal to establish flat arbitraries of 45 cents on shipments weighing less than 2,000 pounds, and 20 cents on shipments weighing 2,000 to 5,999 pounds, was found not shown to be just and reasonable, but their counter proposal to establish arbitraries declining with the classification ratings of commodities was approved. However, the arbitraries, and consequently the resulting rates, did not reflect the traditional percentage relationship of the lower classes to class 100, and this situation still exists.

The instant proposal to superimpose flat amounts upon the present rates, regardless of classification ratings, results in somewhat greater distortions of the percentage relationships. For example, the present class-70 rates on shipments under 2,000 pounds for representative distances of 100 and 500 miles reflect 74 and 72.2 percent, respectively, of the class-100 rates, while the corresponding proposed class-70 rates are 77.1 and 74.3 percent, respectively, of class 100. Concomitant effects are greater increases percentagewise and per mile on the shorter hauls, and on the lower-rated traffic.

The respondents recognize that the proposal changes the traditional percentage relationship between the classes. However, they urge that increased revenues are needed particularly because of increases in labor and terminal costs, the latter being higher proportionately on the smaller shipments. They claim that the use of percentage increases would further burden the higher-rated traffic, when it is the lower-rated less-than-truckload traffic on which the

rates are not compensatory. On the other hand, the protestants assert that the proposed increases cast a disproportionate burden on the low-rated traffic; that increasing rates by flat amounts is contrary to sound classification principles; and that the use of operating ratios as the basis for determining the revenue needs of the respondents is improper.

The Conference compiled data from responses to two questionnaires circulated to its 1,300 members. Sixty-nine carriers responded to one questionnaire, 63 to the other, and 40 of the carriers responded to both. The carriers responding to the questionnaires appear to be typical of all the carriers operating in the territories concerned. They include some of the largest carriers active within the area and their combined operating revenue for the year 1960, was $365,190,777 or 42 percent of the total revenue of $871,040,700 reported by the 389 Class I and Class II motor carriers of property in Middle Atlantic and New England territories. The group of 69 carriers reporting furnished their actual operating revenues and expenses for each of the four quarters of 1960 and for the first quarter of 1961, and the estimated revenues based on the proposed rates and estimated expenses for the remaining three quarters of 1961. The average of the operating ratios for the four quarters of 1960 and the first quarter of 1961 were 99.2, 97.5, 96, 99.7, and 100 percent, respectively. To show that those averages are representative, comparison is made with the average of the ratios of the 389 class I and class II motor carriers of property in middle Atlantic and New England territories for the same five quarters, which are 99.5, 97.5, 96.5, 101.0, and 101.4 percent, respectively. Although the drop in operating ratios for the third quarter of 1960 occurred in the first quarter in which the temporary surcharge was effective, it was also in effect during the last quarter of 1960, and the increases under consideration were effective during most of the first quarter of 1961, when substantial increases in the operating

ratios were experienced. There is evidence which indicates that seasonal weather conditions were influential. The following table shows the number of the 69 carriers with operating ratios in the specified groups:

	1960		1961	
Ratio	Third quarter	Fourth quarter	First quarter	Second quarter (est.)
Under 90	10	1	2	13
90-92.9	8	1	4	15
93-94.9	6	4	7	8
95-97.9	30	19	11	20
98-100	8	14	9	8
Over 100	7	30	36	5

The operating ratios estimated for the last three quarters of 1961 were 98.6, 98.7, and 99.2 percent, respectively. The annual and quarterly reports of the respondents were incorporated in the record by reference, and on brief, the National Industrial Traffic League indicates that a study of the actual expenses and revenues of the 69 carriers for the second quarter of 1961 shows the average operating ratio to be 95.35 percent, instead of 98.6 percent, as a consequence of revenues $1.3 million greater and expenses $1.8 million lower than estimated.

The questionnaire to which 63 carriers responded requested certain traffic and revenue data for any two days in September and October 1960. Of the responding carriers, 24 recapitulated a single day's operation, and a few carriers used days from months other than those named. Respondents' traffic study is in part a substitute for the regular formula study form, I.C.C. Form 2 traffic analysis, which covers a 4-day study period and provides for a breakdown of shipments by weight brackets. The shipments reported were re-rated to reflect the proposed rates, and the increased revenues were compared with revenues either including or excluding the surcharge. Average weights of shipments in each of the less-than-truckload weight categories also were derived. Of the total number of ship-

ments transported by the 63 carriers during the days reported, 41,635 shipments weighing approximately 98.5 million pounds and representing about 30 percent of the total number handled, were subject to the increases. A breakdown of the less-than-truckload shipments by weight brackets to obtain the average weights resulted in the following: 0-1,999 pounds, average 520; 2,000-5,999 pounds, average 2,875; and 6,000 pounds and over, average 8,097. Truckload shipments averaged approximately 30,567 pounds.

The respondents estimate that the total revenues, including minimum charges, would be 4 percent higher than revenues, including the surcharges, and 7.9 percent higher excluding the surcharges. Applying the increase of 4 percent to the revenues of the 389 class I and class II motor carriers in the middle Atlantic and New England regions during the last half of 1960, when the surcharges were in effect, and the average increase of 7.9 percent to the first half of that year when, with the exception of a few days, there were no surcharges, the respondents estimate that the 1960 operating revenues of the 389 carriers of $871 million would have been greater by $51.5 million, and that the ratio of expenses to revenues would have been 93.2 percent.

The estimates are overstated because the average percentage increases are applied to the carriers' total revnues, including many interterritorial shipments which would not be subject to the increased rates. Adjusting the percentages to take account thereof, the resulting 2.2 and 4.3 percent would increase the total revenues to $899 million, or $28 million more than the 1960 total operating revenue, and would produce an operating ratio of 95.6 percent instead of 93.2 percent.

To support their claim that the increases are necessary and that greater increases are justified on the smaller shipments because terminal expenses have risen more than line-haul expenses, the respondents developed cost evidence from the working papers underlying public statement

No. 7-56, "Cost of Transporting Freight by Class I Motor Carriers of General Commodities—Middle Atlantic Region —1955—Other than New York-Philadelphia Carriers," prepared by our Cost Finding Section. By application of Highway Form B,[6] the out-of-pocket costs were adjusted to reflect the year 1959 and the expense level for the first half of 1960 was developed from the quarterly reports for that period. The comparison of 1955 unit costs with those for the first half of 1960 shows that the line-haul cost per vehicle-mile increased during this period by 2.381 cents, or .00466 of a cent per hundredweight-mile, which represent increases of 7.184 and 3.384 percent, respectively. During the same period, the pickup and delivery cost per 100 pounds handled increased 3.047 cents, platform cost per 100 pounds increased 7.126 cents, and billing and collecting cost per shipment increased 13.717 cents, or percentage increases of 23.424, 34.067, and 33.398, respectively.

The total of the out-of-pocket terminal-cost elements specified has not been uniform on shipments of various weights, as demonstrated by the following table showing increases in cents per 100 pounds, 1960 over 1955:

Shipment category	*Increase*
	(cents)
Less-than-truckload:	
Under 2,000 pounds (including minimum-charge shipments)	36.6
2,000-5,999 pounds	16.5
6,000-11,999 pounds	9.9
Truckload:	
24,000 pounds	5.3
30,000 pounds	4.2

[6] Highway Form A, Statement No. 4-55, the so-called long formula, is the basis of costs in statement No. 7-56; Highway Form B, statement No. 3-59, is a simplified form of the Form A formula.

The respondents construct mileage cost scales for the various classes and weight categories, using 1960 costs and the average weights in the less-than-truckload categories, to show both single-line and interline out-of-pocket and total costs for 25-mile distance blocks up to 500 miles, for comparison with the present and proposed rates. The out-of-pocket costs represent 90 percent of operating expenses, rents, and taxes (excluding income tax), and the total expense level represents total carrier operating expenses, rents, and taxes. In addition, the latter level is increased by about 7 percent to show revenue needed to provide an operating ratio of 93 percent. The results are shown in appendix C. With some exceptions,[7] the present class rates exceed the single-line out-of-pocket level of costs shown by the respondents. Although the relationship of single-line or interline traffic to the total traffic is not established, according to statement No. 7-56, single-line traffic represented 74 percent of the total traffic handled. Neither is the volume of traffic moving at the various class ratings shown, but in No. MC-C-1600, class 70 was considered as the average rating of less-than-truckload shipments, and in this proceeding the General Services Administration's evidence of shipments within middle Atlantic territory and between that territory and New England indicates that of 180 commodities representative of those shipped, 64.4 percent were rated class 70 or higher.

As indicated, the respondents' cost data constitute an updating of 1955 costs developed in statement No. 7-56. During cross-examination, the respondents' cost witness

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[7] In the weight bracket under 2,000 pounds, the out-of-pocket costs exceed the present class-70 rates for 25 and 50 miles, and the class-50 rates for all distances; in the 2,000-5,999-pound category, the present class-50 rates are below single-line out-of-pocket costs for the first 100 miles, and in the 6,000-pound and over category, for the first 25 miles; on 24,000-pound truckloads, the present class 27.5 rates are under single-line out-of-pocket costs for 300 miles and over; and on 30,000-pound truckloads, the class 27.5 rates is less than such cost at 500 miles.

referred to a pending new statement for 1960, stating that he expected no difference of substance between its results and the evidence introduced. Subsequently, that study was issued by our Cost Finding Section as public statement No. 1-62. The latter statement, however, is not, as characterized by the Eastern Industrial Traffic League, an "updated reissue of 7-56." As previously indicated, statement No. 7-56 did not include the short-haul New York-Philadelphia carriers, such carriers being the subject of a separate analysis. In statement No. 1-62, the separation of the two groups was not observed. Thus, the latter is not comparable with the statement forming the basis of the respondents' cost evidence.

The National Industrial Traffic League criticizes the respondents' cost evidence as reflecting the relationship of productivity and operations as it existed in 1955; for example, it assumes that the distribution of weight brackets was the same in 1960 as in 1955, and that the percentage of platform handling in each weight bracket was the same. It is critical also of the weight grouping, referring to the relatively higher cost of handling a 150-pound shipment than a 1,500-pound shipment, and suggesting that a more detailed study might show that present rates on less-than-truckload traffic as a whole are compensatory. Insofar as performance factors relate to current traffic distribution or method of operation, the partial effect of the load factor which is based on the change in the system average load for the various periods studied, is considered in the application of the formulas for the adjustment of the costs to a current level. For adjustment of costs to current levels full scale traffic studies are not conducted to obtain all new performance factors. Past studies have shown that factor changes were not sufficient to change the cost to any degree. The exception to the rule would be radical changes in carriers operations or excessive lapse of time. The record does not indicate any revolutionary changes in carrier operations nor is the matter of time considered unreasonable.

The General Services Administration made a study comparing out-of-pocket costs and revenue need with the present and proposed rates for single-line movements of shipments in various weight groups for 56, 186, 255, and 399 miles. The costs from statement No. 7-56 were increased 16.1 percent to the 1960 level, reflecting the difference between the average expense per ton for the year 1955 and the 12-month period ending on September 30, 1960, and 15.7 percent more to reflect revenue necessary to produce an operating ratio of 96 percent, the latter being the highest average ratio which the class I carriers in the middle Atlantic region have experienced since 1950. On the basis of such comparisons, this protestant concludes that there is no need for an increase, except on some shipments between 150 and 999 pounds, and certain class-50 rates in other weight groups. The method followed in so estimating the costs, however, lacks precision, and the results are not representative.

A number of instances are shown where the proposed rates are higher to border points within the affected area which are intermediate over the same routes to points outside the area to which lower rates apply. The respondents claim that they are powerless to correct such situations, and suggest that the rates to and from the border points be required as minimum rates to and from the more distant points. Interterritorial rates are not here in issue.

Reference is made to the examiner's report for a more detailed discussion of the individual protestants' evidence. As previously indicated, there is general agreement among the protestant that the proposed flat increases further undermine the relationship between the classes, and in their opinion place too large a burden on the smaller shipments. There is also opposition to the increases of 1 to 3 cents in the truckload rates on the ground that they are profitable without the increases. With respect to a determination of the need for increases, the protestants, principally the two traffic leagues, attack the use of composite

operating ratios as the primary criterion, and contend that there should be an examination of the transactions between regulated carriers and their subsidiaries or affiliates which provide equipment, supplies, and especially terminal facilities.

Very recently, the Commission had occasion to consider these same arguments. In Investigation and Suspension Docket No. M-14704, *General Increases—Eastern Central Territory*, — I.C.C. —, (decided June 14, 1962), in addition to flat increases of 32 cents on shipments from 300 to 999 pounds and 20 cents on shipments from 1,000 to 1,999 pounds, so-called "constant charges" were proposed as minimum charges on shipments under 300 pounds regardless of the classification rating of the article or commodity shipped. In finding that such rates and charges are not inherently unlawful, the protestants' arguments therein regarding the nature of the increases were discussed as follows:

> The Commission has no authority, of course, to exempt carriers from the statutory duty to provide and maintain just and reasonable classifications of property. We likewise have no authority to assume, contrary to fact, that the elements usually considered in establishing reasonable classifications have any material significance in the transportation of shipments weighing less than 300 pounds. The legal issue, therefore, turns upon the following question of fact: Is weight such a predominant characteristic of all small shipments that other transportation characteristics of the articles shipped are of no material consequence?
>
> We think it is clear beyond any reasonable doubt that the classification of a small shipment does not materially affect the carrier's cost of performing the service. High density, for example, deserves to be reflected in the rates on the larger less-than-truckload shipments but, as the respondents show, its impact is almost lost on shipments weighing less than 300 pounds. Actually, it is the steadily rising cost of labor which has enabled small shipments to be treated as a

> separate and reasonable classification within the meaning of the statute. Labor represents a high percentage of the cost of terminal service and terminal service, in turn, represents 80 percent of the total cost of handling small shipments. In these circumstances the respondents have concluded that it is no longer possible to give effect to classification ratings on small shipments and at the same time to avoid continued losses. Their analysis of the problem is similar to that made by the Commission ten years ago in its 66th Annual Report to the Congress (excerpts from which followed).

The arguments respecting consideration of transactions between respondent carriers and their affiliates in revenue proceedings, and the use of operating ratios to measure revenue need, also raised in the cited proceeding which was decided after the record was made in the present proceeding, were there recognized as follows:

> Although an oprating ratio of 93 percent has been found reasonable in the past, we do not regard such an operating ratio as an immutable standard. In view of the numerous changes which have taken place in the motor carrier industry, we believe this matter should be thoroughly explored in the light of a more complete record developed either in a further hearing in the instant proceeding or in some similar proceeding. At the same time, we believe that the parties, in cooperation with the Commission, should produce all the information required to show the precise effect of transactions between carriers and their subsidiaries or affiliates on carrier operating ratios. In *Surcharge on Small Shipments within Central States*, 63 M.C.C. 157, it was estimated that giving effect to such transactions would not reduce the combined operating ratio of the carriers involved by more than 0.5 percent.

As indicated in the cited report, in numerous motor-carrier general-increase cases we have found an operating ratio of 93 percent to be reasonable. The ultimate findings in the cited proceeding, in view of the nature of the constant charges, were made without prejudice to reopen-

ing the proceeding for further hearing "after a reasonable period of time has been afforded to test the results of the increased rates and charges." Here, except for the arguments on brief and exceptions, the record basis for refusing to accept composite operating ratios as a standard for measuring revenue need is no more persuasive than that in the foregoing proceeding.

While we have found in numerous motor-carrier general-increase cases that an operating ratio of 93 percent appears to be reasonable, we will expect in the future where operating ratios are used as a criterion for revenue need, that evidence of the expense items of representative carriers which form the basis for the operating ratios relied upon, will be given in more detail. The mere showing of present operating ratios of above 93 percent without a showing of the factors that make up such a ratio is not sufficient for our purposes. Among the points that we wish to stress is the necessity of giving us information concerning transactions between involved carriers and their affiliates or subsidiaries. As we pointed out in *General Increases—Eastern Central Territory, supra,* we will expect carrier cooperation in the future in this regard. Since the record in this proceeding was made prior to the statement made in that case, the respondents here shall not be held to such a standard. For the future, though, the carriers are admonished to supply us with all pertinent information and also to conform to the instructions which are a part of the annual report form in reporting details of arrangements between themselves and such affiliates or subsidiaries.

The respondents concede, that, in general, the truckload rates have exceeded costs, but it does not appear that the addition of the relatively small increases thereon, including the 3-cent increase on shipments of 6,000 pounds or more, result in rates which exceed reasonable maximum levels. As above indicated, terminal costs have increased disproportionately on smaller shipments, and in accord

with the finding in *General Increases—Eastern Central Territory, supra,* we conclude that the application of the flat increases is not inherently unlawful. Considering the respondents' cost estimates, which are acceptable as fair approximations, we find that the flat increases on shipments of less than 6,000 pounds do not result in rates which exceed reasonable maxima.

With respect to resulting higher rates to border points than to points beyond over the same routes, obviously, in accord with prior decisions of the Commission, such higher rates would be unlawful, and we concur in the conclusion of the examiner in this respect that if a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain no higher rates at intermediate border points. To the extent that such maladjustments occur, the increased rates are unjust and unreasonable.

We find that the increased rates and charges are just and reasonable, except that where the resulting rates to intermediate points are higher than the rates to more distant points over the same routes, the former are not shown to be just and reasonable. The schedules will be ordered canceled to the extent found unlawful, without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points in the area here considered. The proceeding will be discontinued.

Order

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 20th day of March A.D. 1963.

No. 33652

GENERAL INCREASE—MIDDLE ATLANTIC AND NEW ENGLAND TERRITORIES

It appearing, That by order dated January 13, 1961, the Commission entered into an investigation of certain tariff schedules setting forth new increased rates and charges, and new rules, regulations, and practices applicable on interstate and foreign commerce, which became effective on January 16, 1961, and later;

It further appearing, That a full investigation of the matters and things involved in this proceeding has been made, and that the said Division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel said schedules to the extent found unlawful, on or before May 10, 1963, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 217 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

By the Commission, Divison 2.

HAROLD D. MCCOY
Secretary

(SEAL)

APPENDIX C

Statutes Involved

Interstate Commerce Act, Section 216(b), 49 U.S.C. § 316(b):

> (b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

Interstate Commerce Act, Section 216(d), 49 U.S.C. § 316(d):

> (d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Interstate Commerce Act, Section 216(i), 49 U.S.C. § 316(i):

> (i) In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of passengers or property by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.